No. 12916

In the United States Court of Appeals for the Ninth Circuit

THE TEXAS COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND ON REQUEST FOR ENFORCEMENT OF SAID ORDER

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon the petition of the Texas Company, herein called the Company, to review and set aside an order of the National Labor Relations Board (R. 393–399)[1] issued against the Company on April 16, 1951 (R. 31–58), following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*), herein referred to as the Act.[2] The Board in its answer to

[1] References to portions of the printed record are designated "R." Wherever, in a series of references, a semicolon appears, the references preceding the semicolon are to the Board's findings; those which follow the semicolon are to the supporting evidence.

[2] Relevant provisions of the Act are printed in the Appendix, *infra*, pp. 37–41.

the petition has requested enforcement of its order (R. 400–405). The Board's Decision and Order are reported in 93 NLRB No. 239. This Court has jurisdiction of the proceeding under Section 10 (e) and (f) of the Act, the unfair labor practices here involved having occurred at the Company's operations at and near Los Angeles, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

A. Background of Cody's employment and union activities

From April 6, 1928, until February 1948, George Cody was employed by the Company in the pipeline department of its Los Angeles Basin District in various rank-and-file jobs, from laborer to field gauger (R. 65; 91–92, 96–97, 101–171).

During his employment as a rank-and-file employee, Cody was very active in the Oil Workers International Union, C. I. O., herein referred to as the Oil Workers or the Union, which he joined in 1934 (R. 66; 100). In 1941, he took successive leaves of absence from the Company, for a continuous period of approximately 18 months, to serve as an international representative of the Oil Workers (R. 66; 91, 101, 167–168, 209). Some time after his return to work for the Company, and for an unspecified period ending with his promotion to assistant foreman in February 1948, he served Local 128 of the Oil Workers as Chairman of its Texas Company unit (R. 66; 126–127). Cody participated in that Local's contract negotiations with the Company; was one of the signers for the Oil Workers of the resulting contracts in 1947, including the contract covering

the refinery and pipeline employees; and handled grievances under that contract, first with Superintendent Dreyer and Assistant Superintendent Jones, and then, when necessary, also at higher levels (R. 66; 111–112, 127–128).

In February 1948, Cody was promoted to the supervisory position of assistant foreman (R. 65; 82, 96). As assistant foreman, his job was to make "schedules for the various operations, such as the pump stations, and field gauger, break in people in various jobs in the pipeline division from the line riding job to the field gauging job" and also to check "to see that their work was progressing * * *" (R. 106). Upon his promotion to assistant foreman, Cody secured a withdrawal card from the Oil Workers at the request of Superintendent Dreyer (R. 66; 128–129, 170).

B. Discharge of supervisor Cody for refusing to perform work of striking employees

In September 1948, the Oil Workers called a strike in support of demands for wage increases involving, *inter alia,* the Company's Los Angeles operations (R. 33; 6, 9, 229, 236, 245). Cody was on vacation at that time, from August 23 to September 12, 1948 (R. 66; 97, 172). Four or five days before he was to return to work, Cody telephoned Assistant Superintendent Jones and was told that there was a strike on. Jones advised him, however, to come back to work on Monday, September 13, as the petitioner had obtained a picket-line pass for him from the Oil Workers to do maintenance, safety, and patrol work (R. 66–67; 97–99, 101–102, 129–130, 172–174).

Cody, receiving his picket-line pass,[3] patrolled petitioner's pipelines and checked its pump stations beginning on September 12 (R. 67; 106–107, 130–131, 174).[4] On Thursday, September 13, he was injured in an automobile accident, and was excused from work by Assistant Superintendent Jones from Saturday, September 25, through Tuesday, September 28 (R. 68; 107–108, 177). On Monday, however, Jones telephoned him to report on Tuesday, September 28 (R. 68; 108, 184–185).

When Cody reported to Jones' office on September 28, 1948, Jones advised him that the Company "had changed their minds now," that it was going to start up operations, and that the men were to ride in pairs on lengthened, overtime schedules (R. 68; 108, 185–186). Jones also told Cody to gauge and sample three tanks at the Yorba Linda Pumping Station sometime before October 1, for a "first of the month report" (R. 68; 108, 187). Cody objected to the gauging and sampling, because, as he then told Jones, it was work normally done by the nonsupervisory employees who were out on strike (R. 68–69; 110, 188, 195).[5] He also reminded Jones

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[3] Foreman Letson delivered the pass to Cody's home, Cody being reluctant to cross the picket line at the refinery without a pass (R. 98, 362–363).

[4] Cody testified that he refused to deliver certain strappings on September 21, "because the strappings that are sent out to the various companies * * * are to show on the run tickets as to how much oil was shipped from a tank. I wanted no part in the operation" (R. 67–68; 195–196).

[5] Gauging and sampling work was ordinarily performed by gaugers and pumpers, nonsupervisory employees who normally worked under Cody's supervision but who were then on strike (R. 110, 133, 223–224, 227–228).

of his long service on behalf of the Union, and said that because of his past close association with the Union he had "an actual fear of what would happen to [his] family and [his] home" if he undertook to perform the work normally done by the strikers (R. 69; 108–109, 111, 187–188, 197).

During this conversation between Jones and Cody, Superintendent Dreyer entered Jones' office. Jones told Dreyer that Cody declined to gauge and sample the tanks and asked what should be done about it (R. 69; 109, 188). Cody repeated what he had told Jones and when Dreyer said he must perform the assignment, asked Dreyer "if he couldn't haul [his] partner and let him do the work."[6] Dreyer replied that it would not be fair to do that, and that if Cody "couldn't do the work," they would have to discharge him. Cody then told Dreyer "he would have to give the order." Dreyer thereupon instructed Cody to gauge and sample the Yorba Linda tanks and "get the station ready to run." Cody refused and was discharged (R. 69; 109–110, 111, 188–190, 194–195, 197).[7] Cody immediately secured the cancellation of his withdrawal card from the Oil Workers, reinstated his union membership, and thereafter actively participated in the strike and picketing (R. 42–43, 69–70; 139–143).

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[6] Cody also offered to ride the lines "even 18 hours a day" (R. 194).

[7] Dreyer stated that Cody "would have to take his chances along with the rest of the strikers" (R. 111).

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C. Discriminatory refusal to hire Cody as a rank-and-file employee after termination of strike

On November 4, 1948, when the strike was settled in his department (R. 43; 78–81, 198), Cody asked E. B. O'Connor, manager of the pipeline department and Dreyer's superior, for reinstatement (R. 70; 143–145). O'Connor stated that, in view of the circumstances of his discharge, Cody had to "make his peace" with Superintendent Dreyer before he could be rehired, and made an appointment for Cody to see Dreyer (R. 70; 145–146, 198).

Cody met with Dreyer at the pipeline headquarters on November 8, and asked for the return of his supervisory job, stating that, at O'Connor's suggestion, he had come to see Dreyer to "make amends" (R. 70; 146–148). In the course of the discussion, Dreyer asked whether Cody, if returned to a supervisor's job, would cross certain remaining picket lines to gauge oil or perform other duties that might be assigned him. Cody replied that he could not do that on September 28 and that he still could not do it. (R. 43, 70–71; 148–149, 329–331, 352.) Dreyer stated that he would consider Cody's request for reinstatement and would give him an answer within a week. On November 11, Dreyer telephoned Cody and told him that his decision was still the same as it was on September 28, and that he wished Cody success in finding a job elsewhere. (R. 71; 149, 321–322.)

On Monday, November 15, Cody told O'Connor of his visit to Dreyer and Dreyer's answer (R. 71; 150–151). O'Connor observed that perhaps Cody had been "a little bit too cocky" in requesting his job

back, and asked Cody whether he really wanted to work for the Company, suggesting that perhaps Cody should make his career in organized labor (R. 43, 71; 151). O'Connor stated that he could order Dreyer to put Cody back to work but that he did not think that was the right thing to do and that Cody should "make amends" with Dreyer (R. 71; 151–152, 199). At Cody's request, O'Connor made another appointment for Cody to see Dreyer (R. 71; 152).

On November 16, Cody again saw Superintendent Dreyer, and this time asked for his job or *any job* (R. 43, 71–72; 152–154, 167, 199, 200–202, 227, 323).[8] He told Dreyer that he thought it was an excessive penalty to discharge him in view of his long service with the Company, and referred to other cases where employees had been merely demoted (R. 72; 165–166, 205–206). Dreyer told Cody that he thought Cody's act "was a premeditated act, that if it had been something * * * done on the impulse of a moment, he might be able to excuse it." (R. 72; 200–201, 329, 330.) At the close of the conversation,

[8] The Company's assertion that Cody did not seek employment as a "new" employee but sought either reinstatement to his former position of assistant foreman or to a rank-and-file job but with accrued seniority rights (R. 407, Br. 6) is not borne out by the record. Superintendent Dreyer admitted that on both November 16 and February 1 Cody asked for "any work * * * in the pipeline division" including "even in the gang" (R. 323, 324, 327–328). Dreyer informed him that "he could not be reinstated in any position." (R. 326.) Cody, according to Dreyer, also stated that he "wanted to preserve his 21 years' service record" (R. 323, 328) but obviously, in the context of the record, this was no more than an expression of hopeful expectation on Cody's part if he obtained a job, not a condition (R. 167, 200, 201, 204, 207, 227).

Dreyer said that he would consider the matter and give Cody an answer later (R. 72; 153–154). Dreyer telephoned Cody on November 19, told him that his decision was still the same as it was on September 28, and again wished Cody success in finding employment elsewhere (R. 43, 72; 154).

That same day, Cody again appealed to O'Connor, stating that he was getting "double talk" from Dreyer, and suggested that O'Connor arrange to meet both Dreyer and Cody (R. 72; 154–155). O'Connor said he was not satisfied with Dreyer's answers to Cody and would telephone Cody about the matter later (R. 43, 72; 155–156). Not hearing from O'Connor, however, Cody wrote him a letter on December 16, 1948, and then visited him after January 1, 1949 (R. 72; 155, 156, 159–163, 167, 202). O'Connor again told Cody to "make amends" with Dreyer (R. 72; 163). Cody saw Dreyer for the last time on February 1 or 2, 1949, and again asked for a job (R. 43, 72–73; 206–207, 327, 328). Dreyer told Cody in effect that the matter of Cody's application for work and Dreyer's reasons for refusal had been fully discussed and that his ruling was final (R. 43, 72–73; 328–329).[9]

II. The Board's conclusions

Upon the foregoing facts the Board found (R. 42–49) that the Company in denying Cody rank-and-file employment because of his prior refusal to perform the work of the strikers violated Section 8 (a) (1)

[9] Dreyer admitted that there were new hires in laborer jobs, the lowest classification, under his jurisdiction after November 16, 1948 (R. 344, 348–350).

and 8 (a) (3) of the Act. The Board found that Cody as an applicant for such employment stood in the position of an "employee" within the meaning and protection of the Act; that his refusal to perform the work of the rank-and-file strikers constituted concerted activity for mutual aid and protection for which, as an employee, he enjoyed the protection which the Act extends to such activities; that although Congress denied supervisory employees the affirmative protection of the Act for such activities, it did not convert such activities by supervisors into unlawful or wrongful conduct so as to deprive an ex-supervisory employee of the normal protection of the Act for such activities when he applies for rank-and-file employment.

III. The Board's order

The Board's order (R. 51–54) requires the Company to cease and desist from discriminating with regard to the hire and tenure of employment of Cody. It also requires the Company to cease and desist from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Oil Workers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities as guaranteed in Section 7 of the Act, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement as authorized in Section 8 (a) (3). Affirmatively, the order requires the Com-

pany to offer Cody employment as an employee in its pipeline division of the refining department, Pacific Coast Division, Los Angeles, California, to make him whole for any loss of pay he may have suffered by reason of its discrimination against him, from the date, after November 16, 1948, when the Company first employed any individual in any job for which Cody was qualified, and to post appropriate notices.

SUMMARY OF ARGUMENT

The Board properly found that the Company violated Section 8 (a) (3) and 8 (a) (1) of the Act by refusing to employ Cody for rank-and-file work because of his prior refusal, as a supervisor, to perform the work of the rank-and-file strikers. As an applicant for rank-and-file employment Cody was an employee within the meaning and protection of the Act. His refusal to perform the work of the strikers was concerted activity for mutual aid or protection for which he, as an employee, would have been protected under the Act.

In excluding supervisors from the protection of the Act Congress did not convert concerted or union activity by supervisors into illegal or wrongful conduct which would justify denial of employment to any employee. Congress simply sought to remove any compulsion upon employers to refrain from discharging or otherwise discriminating against supervisors for engaging in union or concerted activities in order to assure to management the undivided loyalty of its supervisory personnel.

Congress, however, did not intend to confer a privilege upon employers to discriminate against employees within the meaning of the Act on the basis of their prior concerted activity as supervisors. Such an interpretation of the Act is not only inconsistent with the legislative purpose in privileging employers to discriminate against supervisors but would also license employers to permanently blacklist from employment rank-and-file employees who, as supervisors, had previously engaged in such activities. Congress manifestly intended no such result.

Accordingly, although Cody as a supervisor was not protected for refusing to "scab," as an applicant for rank and file employment he regained the protection of the Act for his prior participation in concerted activities. And the Company's refusal to employ Cody for rank-and-file work, based as it was upon Cody's earlier concerted activity, constitutes restraint and discrimination within the meaning of Section 8 (a) (1) and 8 (a) (3) of the Act.

ARGUMENT

The Board properly found that the Company violated Section 8 (a) (3) and (1) of the Act by refusing to employ Cody in a nonsupervisory capacity because of his prior participation in concerted activities in support of the rank-and-file strikers

The Company asserts throughout its brief that Congress removed supervisory employees from the protection of the Act and that it was not unlawful for it to discharge Cody from his supervisory post for his refusal to perform the work of the strikers.

From this premise the Company concludes and asserts that it was not unlawful for it to deny Cody rank-and-file employment for that reason even though Cody, as an applicant for such work, was no longer a member of the supervisory class of employees.

The Company cites many cases in support of its premise, here undisputed, that Congress in the amended Act removed any compulsion upon employers to refrain from discharging or otherwise discriminating against supervisory employees, as supervisors, who engage in concerted or union activities. But the premise does not support the conclusion the Company draws and begs the question at issue. The Company's position reduces itself to the argument that the privilege given an employer to discriminate against supervisory employees for their union or concerted activities also permits their permanent blacklisting for employment as rank-and-file employees. But, as the Court of Appeals for the District of Columbia Circuit pointed out in the closely analogous case of *John Hancock Life Ins. Co.* v. *N. L. R. B.,* 28 L. R. R. M. 2236, decided July 5, 1951, it is inconceivable that Congress meant to "license the vicious practice of blacklisting" with respect to ex-supervisory employees. Such an interpretation of the Act, as that court pointed out, would constitute "a perversion of the legislative intent."

Accordingly, it is the Board's view that the privilege which Congress conferred upon employees to discriminate against supervisory employees for union or concerted activities cannot reasonably be said to

include the further privilege to permanently disqualify ex-supervisory employees from rank-and-file employment.

We believe for the reasons stated hereinafter that the Board's appraisal of the congressional intent is reasonable and correct.

1. Cody as an applicant for rank-and-file employment was an employee within the meaning and protection of the Act

Section 2 (3) of the Act provides that the term "employee" "shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise * * * but shall not include * * * any individual employed as a supervisor." This comprehensive statutory definition of the term "employee," as the Supreme Court has pointed out, includes, in the absence of "some specific delimiting provision," not only the employees of a particular employer but also in a generic sense, members of the working class, including applicants for employment. "To circumscribe the general class, 'employees' we must find authority either in the policy of the Act or in some specific delimiting provision of it." *Phelps Dodge Corporation* v. *N. L. R. B.,* 313 U. S. 177, 191–192. Accord: *John Hancock Life Ins. Co.* v. *N. L. R. B., supra; N. L. R. B.* v. *Waumbec Mills Inc.,* 114 F. 2d 226, 232–234 (C. A. 1).[10]

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[10] In its brief (pp. 28–33) the Company asserts that the *Phelps Dodge* decision is inapplicable here because in the amended Act Congress has specifically excluded supervisory employees from the definition of the term "employees" in the Act and thereby sup-

In the light of this settled interpretation it is not open to question that Cody, when he applied for rank-and-file employment on November 16, 1948, was an employee within the meaning of the Act. His supervisory status had been previously terminated when he was discharged by the Company. As an applicant for rank-and-file employment he was no longer a supervisor but a member of "the general class" included, as the Supreme Court pointed out (*Phelps Dodge* case), within the statutory definition of the term "employee" and therefore entitled to the protection of the Act for union or concerted activity for mutual aid or protection.[11]

2. Cody's refusal to perform the work of the rank and file strikers was concerted activity for mutual aid and protection for which, as an employee, he would have been protected under the Act

Section 7 of the amended Act, as in the original, guarantees to employees the right, among others, "to assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection" free from employer restraint or discrimination. One of the traditional forms of assistance to a labor organization and concerted activity for mutual aid and protection has

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plied a "specific delimiting provision." The Company's argument appears to be that once a supervisor, always a supervisor. Obviously, to state the proposition is to refute it. Nothing in the Act suggests that an individual who loses his supervisory status does not as an applicant for rank-and-file employment revert to the status of an employee within the statutory definition.

[11] The Company's assertion (Br. 6) that Cody did not seek employment as a "new" employee is not borne out by the record. See *supra*, n. 8, p. 7.

been the well recognized practice of workers, particularly union members, to refuse to "scab" or serve as strikebreakers and perform the work of striking employees. "In common current usage * * * the term 'scab' is most often applied to any person who hires or volunteers to take the place of a worker out on strike. * * * In the eyes of trade unionists 'scabbing' is the sin of sins."[12] In refusing to perform the work normally done by strikers, employees, like Cody here, are, to that extent and in the most literal and fundamental sense, rendering assistance to the striking union and making common cause with its members in their concerted activity. As Judge Learned Hand said in *N. L. R. B.* v. *Peter Cailler Kohler,* 130 F. 2d 503 (C. A. 2) at pp. 505–506:

> * * * When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

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[12] W. R. Browne, *What's What In The Labor Movement*, p 421. The opprobrium with which workers universally regard "scabbing" is a by-word in labor circles. See, P. F. Gemill and R. W. Blodgett, *Economics Principles and Problems*, Vol. I, pp. 260–261; J. A. Fitch, *The Causes of Industrial Unrest*, p. 223.

> So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in "mutual aid or protection." [13]

The Act has "generally been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 346. In enacting a statute having such scope, Congress cannot reasonably be deemed to have excluded from the right of employees to assist labor organizations and engage in concerted activities so traditional a practice as their refusal to "scab." *Rapid Roller Co.* v. *N. L. R. B.,* 126 F. 2d 452, 461 (C. A. 7), certiorari denied, 317 U. S. 650.

This is not to say that the Act makes it unlawful for an employer to discharge an employee for any activity sanctioned by or in support of a union. Where such activity is *per se* illegal or in support of unlawful concerted activity or so completely without

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[13] Accord: *N. L. R. B.* v. *Montag Bros.*, 140 F. 2d 730 (C. A. 5), enforcing 51 NLRB 366; *N. L. R. B.* v. *J. G. Boswell*, 136 F. 2d 585 (C. A. 9); *Fort Wayne Corrugated Paper Co.* v. *N. L. R. B.*, 111 F. 2d 869, 874 (C. A. 7); *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. 2d 452 (C. A. 7), certiorari denied, 317 U. S. 650.

justification as to be indefensible, the employer is free to take disciplinary action against those who participate in such misconduct.[14] Nor is an employer required to permit an employee to remain on the job and at the same time refuse to do the employer's lawful bidding. In those circumstances an employer is privileged, as an incident of his right to replace economic strikers, to give the employee an election to either work as instructed or to leave and join the strikers. But the employer may not compel the employee, upon pain of dismissal or other reprisals, to forego his traditional and protected right to refuse to "scab." *Pinaud, Inc.,* 51 NLRB 235; See also *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45–46. In this fashion a practical balance is struck between the right of the employer to operate his business and the right of the employee to engage in concerted activity for mutual aid and protection.

Accordingly, Cody's refusal to "scab" was a form of concerted activity for which, as an employee, he would be protected by the Act.

3. The amended Act did not convert concerted activity by supervisors into illegal or wrongful conduct which would justify denial of employment to any employee

Under the original Act, it was settled that supervisory employees, like rank and file employees, were employees within the meaning of the Act and there-

[14] *Hazel-Atlas Glass Co.* v. *N. L. R. B.*, 127 F. 2d 109, 117 (C. A. 4; on rehearing); *N. L. R. B.* v. *Kelco Corp.*, 178 F. 2d 578 (C. A. 4).

fore entitled to the same protection for assisting labor organizations or otherwise engaging in concerted activities for mutual aid and protection which the Act extended to nonsupervisory employees. *Packard Motor Car Co.* v. *N. L. R. B.,* 330 U. S. 485. And, by that token supervisors who refused to "scab" ordinarily enjoyed [15] the same protection against restraint or discrimination for engaging in such sympathetic action as did the rank and file employees. Cf. *American Steel Foundries* v. *N. L. R. B.,* 158 F. 2d 896 (C. A. 7).

In Section 2 (3) of the amended Act Congress redefined the term "employee" so as to withdraw from supervisors the protection from employer discrimination which the statute had theretofore guaranteed to them, as to other employees, for assisting labor organizations or engaging in concerted activity for mutual aid or protection. But in denying to supervisors the protection which they had previously enjoyed, Congress clearly did not intend, as the Board pointed out and as is evident from the legislative history of the amendment, its purpose and the express provisions of the Act itself, to convert such concerted activity on the part of supervisors into indefensible,

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[15] The Board declined to extend the protection of the original Act to supervisors who refused to perform maintenance work, during a strike of nonsupervisory personnel where it appeared that it was customary for supervisors to do such maintenance work during periods of emergency when rank and file employees were not available and also that unless certain plant facilities were maintained during the strike, serious injury to life and property might have resulted from explosions and other causes. *Albrecht* v. *N. L. R. B.*, 181 F. 2d 652 (C. A. 7).

or wrongful or illegal conduct, akin to picket line violence,[16] willful destruction of an employer's property[17] mutiny[18] or a sitdown strike,[19] or recurrent "quickie" strikes[20] which would normally justify an employer's discharge of, or refusal to hire any employee regardless of rank. On the contrary, Congress explicitly recognized the "right" of supervisory employees to engage in otherwise lawful concerted activities; it did not make participation in such activities by supervisors unlawful or wrongful but only withdrew from that class the affirmative statutory protection which it had previously accorded to them and other employees for engaging in concerted activities.

In the *Packard Motor* case, *supra,* decided in March 1947, the Supreme Court held that supervisors were employees within the meaning of the original Act. Later that year Congress, in considering amendments to the original Act, took note of the fears expressed by the employer in the *Packard* case and others that if supervisors were to be deemed employees within the meaning of the statute, and entitled to its protection for engaging in concerted activities, that situation would give rise to conflicting loyalties between a supervisor's organizational interest and his allegiance to

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[16] *N. L. R. B.* v. *Kelco Corporation*, 178 F. 2d 578 (C. A. 4); *N. L. R. B.* v. *Ohio Calcium Co.*, 133 F. 2d 721 (C. A. 6).

[17] *N. L. R. B.* v. *Mt. Clemens Pottery Co.*, 147 F. 2d 262, 267–268 (C. A. 6).

[18] *Southern Steamship Company* v. *N. L. R. B.*, 316 U. S. 31.

[19] *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

[20] *Automobile Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

his employer's interests. It was urged upon Congress that unless it took steps to exclude them from the coverage of the statute, "management will be deprived of the undivided loyalty of its foremen" because there "is an inherent tendency to subordinate their interests whenever they conflict with those of the rank and file." S. Rept. No. 105, 80th Cong., 1st Sess., p. 5. See also H. Rept. No. 245, 80th Cong., 1st Sess., p. 13–17. These views prevailed and in response thereto Congress excluded supervisors from the definition of the term "employee" as used in the Act, thereby withdrawing from them the affirmative protection of the Act for concerted activities and leaving employers free to remove supervisors who engaged in union or concerted activities from any role in the management hierarchy. But at the same time, Congress did not redefine the "right" of supervisory employees to engage in otherwise lawful concerted activities so as to make participation in such activities by supervisors unlawful or wrongful or the basis for permanent disqualification from nonsupervisory employment.

Thus, both the Senate and House committees, reporting upon the bill which later became the amended Act, agreed that the limitation upon the term "employee" was not designed to make it unlawful for supervisors to engage in union or concerted activities but was designed, as Congress saw it, to assure management "of the undivided loyalty of its foremen," and to remove any compulsion upon employers to retain as a member of the management hierarchy any

supervisor who engaged in concerted activities. As both committees reported, the bill did "not prevent anyone from organizing. * * * It merely relieves employers who are subject to the national act from any compulsion [under the Act] to accord to the front line of management the anomalous status of employees." S. Rept. No. 105, 80th Cong., 1st Sess., p. 5. See H. Rept. No. 245, 80th Cong., 1st Sess., pp. 13–17. Senator Taft, coauthor of the amended Act, explaining the effect of the amended definition of employees, stated "They [supervisors] are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act." 93 Cong. Rec. 3836. See also to the same effect the statement of Representative Hartley in 93 Cong. Rec. 3423.

Nothing in the legislative history of the Act suggests that Congress, in withdrawing from supervisors the affirmative protection of the Act for engaging in concerted activities, intended to place the stamp of illegality or misconduct upon such activities so as to disqualify the participant, as an "employee" within the meaning of the Act, from future rank and file employment. Any doubt on this score is conclusively resolved by Section 14 (a) of the Act which provides, in pertinent part, "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law,

whether national or local, relating to collective bargaining." In other sections of the Act, Congress "demonstrated that it knew how" (*Amalgamated etc. Employees* v. *WERB,* 340 U. S. 383, 397), had it been so minded, to make participation in concerted activities by supervisors illegal and to prescribe penalties for such conduct. Thus, in Section 305 of the *Labor Management Relations Act, 1947,* it expressly provided that "It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporation to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency."

Consistent with the legislative history of the Act and its specific provisions, the courts have recognized that the exclusion of supervisors from the protection of the Act did not convert concerted activities undertaken by them which had been previously protected into unlawful or improper conduct permanently disqualifying the participant from rank and file employment. As the Court of Appeals for the Sixth Circuit pointed out in *N. L. R. B.* v. *Budd Mfg. Co.,* 169 F. 2d 571, certiorari denied, 335 U. S. 908, at p. 577, "There is nothing in the amended Act which restricts freedom of speech on the part of supervisory employees. Section 14 (a) of the amended Act specifically reserves to them the right to join a labor

organization. The rights guaranteed by the First Amendment [i. e. the right to form and assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for mutual aid or protection] are not interfered with. The amended Act merely changes the statutory method of enforcing those rights." And as the California District Court of Appeals stated in *Safeway Stores* v. *Clerks Association,* 28 LRRM 2583, at p. 2584:

> It is clear that by the adoption of Section 14 (a) the Congress intended to exclude supervisory employees from all the benefits of the Wagner Act as modified by the Taft-Hartley Act and from the like benefits of any state ("local") act which placed any compulsion or restraint upon employers in collective bargaining with their employees. It is equally clear that the Congress by this enactment did not place any restriction on the common law or nonstatutory rights of supervisory employees to organize for the purpose of bargaining with their employers and to use any of the recognizedly legal methods of pressure (striking, picketing, etc.) which the common or nonstatutory law accorded to them as employees. Indeed the Congress went a step further and made explicit, what otherwise would only have been implicit, by expressly enacting in section 14 (a): "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization."

In sum, both the legislative history and the language of the Act itself establish that Congress in excluding supervisors from the coverage of the Act intended to do no more than withdraw from them the affirmative protection for concerted activities previously guaranteed to them, and absolve from liability under the statute employers who discharged or otherwise discriminated against supervisors for engaging in such activities. Congress did not intend to stigmatize concerted activity by supervisors as wrongful or equate it with unlawful action.

Accordingly, under the amended Act Cody's refusal to "scab" and perform the work of the rank-and-file employees who were engaged in an economic strike was neither unlawful nor akin to conduct which would constitute cause for the disqualification of any employee from employment. The amended Act only withdrew from him, as a supervisor, the affirmative protection against discrimination for that conduct which the original Act had given him. And the Company was privileged, as it did, to terminate his employment as a supervisor on that account. But, as is shown below, the Company's privilege to discriminate against him ceased with Cody's return to the status of employee.

4. The Company's privilege to engage in discrimination against Cody on the basis of his concerted activity as a supervisor terminated when Cody resumed the status of an "employee" within the meaning and protection of the Act

As already stated, the basic purpose prompting Congress to exclude supervisors as a class from the affirmative protection of the Act was to insure to

management the "undivided loyalty" of its supervisory personnel. And to protect that interest, Congress, as the Board has of course recognized, privileged the employer to take disciplinary action that would otherwise be discriminatory and unlawful if the individual were an employee against supervisors who engage in concerted or union activities.

But in the light of the legislative purpose and the serious consequences that would flow from a contrary interpretation, it would seem clear that Congress could not have intended to strip an ex-supervisor permanently of the protection of the Act for prior concerted activity and to permit an employer to permanently blacklist an ex-supervisory employee. The interest of the employer in the undivided allegiance of supervisory employees which Congress sought to protect is fully vindicated and served once the employer has removed a supervisor who engages in concerted activity from the management heirarchy. And the protection of that interest plainly does not require that ex-supervisory employees, who have resumed that status of employees within the meaning of the Act, be permanently subject to reprisals, as a rank-and-file employee, for prior concerted activity. Once the individual resumes the status of employee the employer's interest in the "undivided loyalty" of his "front line," in the sense intended by Congress, no longer exists with respect to that individual and no legitimate purpose is served in thereafter denying to him protection for his previous concerted activity

and permitting the employer to disqualify him from rank and file employment for that reason.

Moreover, the interpretation urged by the Company would license not only it but other employers forever to blacklist or subject to economic reprisals a rank-and-file employee, like Cody, who had, during his status as a supervisory employee, engaged in concerted activities. Indeed, the Company not only recognizes this implication of its contention but insists that this is precisely what Congress intended to accomplish.

That Congress sought to inflict no such penalties upon ex-supervisory employees is, we think, made manifest by its contrasting treatment of government employees who engaged in strikes and of employees who engaged in strikes in violation of Section 8 (d) of the Act. With respect to government employees who participated in a strike, Congress, in Section 305 of the *Labor Management Relations Act, 1947* (*supra,* p. 22) specifically provided for the forfeiture of their civil service status and in effect partially blacklisted them from future government employment for three years. In Section 8 (d) of the Act Congress specifically provided that any employee who engaged in a strike called without compliance with the "waiting period" therein prescribed "shall lose his status as an employee of the employer engaged in the particular labor dispute * * * and * * * such loss of status shall terminate if and when he is reemployed by such employer." There, Congress specifically conferred a privilege upon the employer to permanently blacklist the offending employee.

Congress enacted no such similar provisions with respect to supervisory employees. It excluded them as supervisors from the protection of the Act. But, significantly it omitted any provision that as "employees" they should also be subject to continuing reprisals or blacklisting on the basis of their previously unprotected concerted activities as supervisors. In the absence of evidence of a Congressional purpose to license the blacklisting of ex-supervisory employees, with respect to rank-and-file employment, for prior participation in concerted or union activities, and in view of the reasons which prompted Congress to exclude supervisors from the protection of the Act, we submit it was reasonable for the Board to conclude, as it did, that once a supervisory employee resumes the status of an employee, he regains the protection of the Act for his previous concerted activity.

An analogy will serve to demonstrate the soundness of the Board's conclusion. Suppose, for example, that an employee prior to the passage of the original Act had engaged in concerted or union activities. An employer would have then been free to discharge or otherwise discriminate against that employee since the latter's activities had no affirmative statutory protection. Clearly, however, it cannot reasonably be argued that after the passage of the Act the employer could have blacklisted the employee or visited economic reprisals upon him on the basis of his previously unprotected activity. At that juncture, the employee gained what he had previously lacked, the protection of the Act, and to have then permitted the

employer to penalize him for his previous union, albeit then unprotected, activities would have been tantamount to sanctioning his permanent blacklisting. Such a result would have seriously thwarted the Congressional purpose in protecting employees who engaged in concerted activities and it is unthinkable that Congress denied the employee in that situation the protection of the Act. Cf. *Nevada Consolidated Copper Corp.,* 26 N. L. R. B. 1182, 1192, 1198–1200, enforced 316 U. S. 105; *Phelps Dodge Corp.,* 19 NLRB 547, 565, enforced 313 U. S. 177.

We submit it is equally unreasonable to suppose that Congress meant to license an employer to discriminate against an ex-supervisor, like Cody, on the basis of his concerted activities as a supervisor once that individual has resumed the status of an employee and thereby regained the protection of the Act. The decision of the Court of Appeals for the District of Columbia Circuit in *John Hancock Life Ins. Co.* v. *N. L. R. B., supra,* is precisely in point. There the employer discharged a supervisory employee for having testified in Board proceedings and thereafter refused him rank and file employment for the same reason. The Board found that as an applicant for rank and file employment the ex-supervisor was an employee within the meaning of the Act and that the employer's refusal to hire him violated Section 8 (a) (4) of the Act which enjoins employers from discriminating against employees for having testified in Board proceedings. The employer, like the Company here, asserted that the ex-supervisor was not entitled to the protection of the Act because he was a super-

visor when he testified. The Circuit Court agreed with the Board that as an applicant for rank and file work, the individual in question was an employee within the meaning of the Act and that as an employee he regained the protection of the Act for having testified in the Board proceeding. The Court rejected the Company's contention, saying that such an interpretation of the Act would not only "license the vicious practice of blacklisting" but also constitute "a perversion of the legislative intent."

In sum, as an applicant for rank-and-file employment Cody became an employee within the meaning of the Act. As an employee he regained what had previously been denied to him, the protection of the Act for his prior concerted activities. To conclude otherwise would be not only to ignore the precise nature of the limitations imposed by Congress on union or concerted activities by supervisors but also to sanction his permanent blacklisting from employment—a result that Congress did not intend.

5. The Company's other contentions

Apart from its basic contention that the privilege which the Act granted it to discharge Cody from his supervisory post for his refusal to perform the work of the strikers also includes the right to exclude him permanently for that reason from rank and file employment, the Company makes the following additional contentions.

a. The Company asserts (Br. 39–48) that Cody's refusal to perform the work of the strikers was not in any event concerted activity for mutual aid or

protection within the meaning of the Act because Cody acted individually and sought no immediate benefit for himself from the Company. But neither the lack of agreement between Cody and the strikers to act in "concert" with each other nor the fact that Cody had no immediate stake in the outcome of the strike removes his action from the scope of concerted activity for mutual aid or protection. It is enough that Cody by his action in fact lent assistance to the striking union. And it is enough that his stake in the outcome is simply that by his action he in effect assured himself "in case his turn ever comes, of the support of the [strikers] whom [he was] helping; and the solidarity so established is 'mutual aid' in the most literal sense as nobody doubts." Judge L. Hand in *Peter Cailler Kohler, supra.*

In this connection, the Company relies upon *N. L. R. B.* v. *Illinois Bell Telephone Co.,* 189 F. 2d 124 (C. A. 7) and *N. L. R. B.* v. *International Rice Milling Co.,* 341 U. S. 665. The *Rice Milling* case is clearly inapplicable here. There the court held that a union which picketed the premises of an emlpoyer with whom it had a dispute and thereby induced an individual employee of that employer's customer not to cross the picket line for the purpose of making deliveries to the picketed employer had not induced employees of the customer to engage in a concerted refusal to perform service in furtherance of a secondary boycott within the meaning of Section 8 (b) (4) (A) of the Act. That section provides that it shall be unlawful for a union to induce the employees of an employer to engage in a concerted refusal to

perform service where an object thereof is to force one employer to cease doing business with another. The court concluded that Section 8 (b) (4) (A) could apply, if at all, only if there was inducement to "concerted action *of the customers' employees to force the customer to boycott the mill*" (*N. L. R. B.* v. *Denver Building Trades Council,* 341 U. S. 675, 687–688.) [Italics added.] No such inducement was found to exist there. Nothing in the case suggests that the employee who refused to cross the picket line was not acting in concert, or making common cause, with the picketing union within the meaning of Section 7 of the Act or that if that employee had been discharged for that reason he would not have enjoyed the full protection of the Act for concerted activities.

In the *Illinois Bell* case, the Seventh Circuit Court held that the Wagner Act, even though it protected supervisors in the same manner as rank-and-file employees, did not extend its protection to those employees in a situation where they, at a time when their own union had a contract with their employer and was in the process of negotiating a new contract, refused to work behind picket lines maintained by another union. The Board disagrees with that decision and has petitioned for a writ of certiorari. In any event, it is not controlling here because that case has the feature, not present here, that the supervisors' refusal to work behind the picket line, in the circumstances there present, took on the aspects of a "wildcat strike" which has been held not to enjoy the protection of the Act. See *N. L. R. B.* v. *Draper Corp.,* 145 F. 2d 199 (C. A. 4).

b. The Company also argues that (Br. 48–58) the denial of rank and file employment to Cody cannot constitute a violation of Section 8 (a) (1) or 8 (a) (3) since it cannot be said that its action discourages or tends to discourage union or concerted activity by Cody, as an employee, or other rank and file employees. Its action, the argument runs, at most can only signify to Cody and other employees that the Company will, as it may lawfully do, penalize supervisors, not rank and file employees, who engage in such activities. But this contention overlooks the inescapable impact which the Company's virtual blacklisting of Cody from rank and file employment will have not only on Cody but also on his fellow rank and file workers. If the Company is correct in its interpretation of the Act, Cody faces, as we have shown above, the prospect of permanent unemployment. Such a penalty is not likely to predispose him to look forward to future participation in union or concerted activity even as a rank and file employee. On the contrary, the greater likelihood is that it will predispose him to give assurances to a prospective employer, in order to escape permanent blacklisting from employment and obtain work, to abstain from all such activities in the future. And in his plight his fellow employees, without regard to such niceties as that the Company's object lesson is intended to be confined to supervisors and ex-supervisory employees read a compelling object lesson as to the advisability of their own future participation in such activities. Thus, the Company's reprisal against Cody in deny-

ing him rank and file employment tends in a very real sense to restrain and discourage both Cody and his fellow employees from future participation in union or concerted activities.[21]

The circumstance that the Company's action may not have been prompted by a conscious anti-union purpose does not remove it from the proscription of the Act. If, as here, the employer's discriminatory action is based on protected union or concerted activity, it is immaterial that he may not have been motivated by a purpose to injure the union. For as the Board and the courts have pointed out economic reprisals against employees based in fact upon their

[21] In support of its contention in this respect, the Company, as did a minority of the Board, relies upon the Board's decision in *Panaderia Sucesion Alonso*, 87 NLRB 877. There, the Board found that the employer did not violate the Act in discharging one Gutierrez who had protested the employer's dismissal of an agricultural employee. The Board concluded that since agricultural employees are not covered by the Act, Gutierrez had not engaged in concerted activities protected by the Act and that the circumstance that his dismissal may have had the incidental effect of discouraging employees within the meaning of the Act from exercising their statutory rights did not cause the employer's essentially privileged conduct to assume the character of an unfair labor practice. As the Board pointed out in the instant case, in the *Panaderia* case, the discharge was one which was clearly aimed at the activities of agricultural employees and of the single nonagricultural employee who joined with them. But here, the Company's refusal to employ Cody for a rank and file job, *as distinguished from its discharge of Cody from his supervisory post*, was directed against Cody as an employee for activities for which in that capacity he had regained the protection of the Act. In these circumstances the discouraging effect which the Company's denial of employment had upon the union activities of Cody and other employees within the protection of the Act, cannot be regarded as incidental to "essentially privileged conduct."

union or concerted activities necessarily tend, without regard to the "state of the employer's mind" (*American Shuffleboard Co.* v. *N. L. R. B.,* 28 LRRM 2489 (C. A. 3), to discourage such activities. Cf. *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793. *Home Beneficial Life Ins. Co.* v. *N. L. R. B.,* 159 F. 2d 280, 285 (C. A. 4), certiorari denied, 332 U. S. 758; *N. L. R. B.* v. *Hudson Motor Co.,* 128 F. 2d 528, 533 (C. A. 6).

c. The Company also asserts (Br. 59–76) that the Board's decision and its order requiring it to offer Cody rank and file employment are in conflict with Section 10 (c) of the Act which provides that "no order of the Board shall require the reinstatement of any individual who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." Since, the Company asserts, Cody was discharged from his supervisory post "for cause" i. e. a reason that was not illegal, Section 10 (c) precludes the interpretation placed upon the Act by the Board here and also its order requiring the Company to offer Cody rank and file employment and make him whole for loss of pay caused by the discrimination against him. But the prohibition in Section 10 (c) against reinstating employees who have been discharged for cause is applicable only where the discharge is an issue in the case. It has no application to a situation like the instant one where the employee may have been

previously discharged for cause but that discharge is not the issue in the case. The issue here is whether the Company denied Cody's application for rank-and-file employment for cause. As we have sought to show, Cody was denied employment for concerted activities for which, as an employee, he was protected under the Act. Having found that employment was denied him for unlawful discriminatory reasons, the Board could, as it did, require the Company to undo that wrong. *John Hancock Life Ins. Co.* v. *N. L. R. B., supra; N. L. R. B.* v. *Dixie Shirt Co.,* 176 F. 2d 969, 974 (C. A. 4) and cases cited there; *N. L. R. B.* v. *Fulton Bag and Cotton Mills,* 175 F. 2d 675, 677 (C. A. 5); *Victor Mfg. & Gasket Co.* v. *N. L. R. B.,* 174 F. 2d 867, 868 (C. A. 7).[22]

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[22] The Board has held that where an employer has in effect a nondiscriminatory rule against "down grading" he may lawfully refuse rank and file employment to a former supervisor previously discharged for continuing union membership. *Lily-Tulip Corp.*, 88 NLRB 892, 893. Here, as the Board found (R. 49), there is no evidence that the Company had adopted such a rule so as to bring into operation the Board's ruling in the *Lily-Tulip* case. On the contrary, in the Company's 1947 and 1948 contracts with the Oil Workers, there is a provision for the "down grading" of supervisory employees who were found to be incapable of performing the work to which they had been promoted (R. 124, 125). And Cody was not denied rank and file employment on the basis of any such rule.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition to set aside the Board's order be denied, and that a decree should issue enforcing the order in full.

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OCTOBER 1951.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, *et seq.*) are as follows:

Sec. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employee as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railroad Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in

connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) it shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means

of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof

to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the

Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

LIMITATIONS

* * * * *

Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

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